No. 508

JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1967

THELMA LEVY, in her capacity as Administratrix of the succession of LOUISE LEVY and as tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY AND AUSTIN LEVY,

v.

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D., and A.B.C. INSURANCE COMPANIES.

Appeal from the Supreme Court of Louisiana.

BRIEF OF ATTORNEY GENERAL STATE OF LOUISIANA.

HONORABLE JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

WILLIAM P. SCHULER,
Second Assistant Attorney General.

DOROTHY D. WOLBRETTE,
Assistant Attorney General.

L. K. CLEMENT, JR.,
Assistant Attorney General.

INDEX

TABLE OF AUTHORITIES

No. 508

In the
Supreme Court of the United States

OCTOBER TERM, 1967

THELMA LEVY, in her capacity as Administratrix of the succession of LOUISE LEVY and as tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY AND AUSTIN LEVY,

v.

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D., and A.B.C. INSURANCE COMPANIES.

Appeal from the Supreme Court of Louisiana.

BRIEF OF ATTORNEY GENERAL STATE OF LOUISIANA.

I.

INTEREST OF ATTORNEY GENERAL OF LOUISIANA

The State of Louisiana is not a party to this suit. (App. pp. 51-54; Appellant's brief p. 5, note 1). The interest of the Attorney General of Louisiana arises from the fact that the constitutionality of Article 2315 of the Louisiana Civil Code has been attacked by Appellants. Louisiana Code of Civil Procedure, Article 1880.

II.

ARGUMENT

May it please the Court:

The sole question before this Court is whether the Fourteenth Amendment, in prohibiting a state from denying any person "the equal protection of the laws," has barred Louisiana from formulating her domestic policy as she has in an area concededly within the regulatory power of the State.[1]

Appellants[2] and Amicus Curiae[3] have proposed

[1]The case at bar is not a "due process" case at all. *The rights of illegitimates cannot be said to stem from the traditional concept of due process.* This Court has said so often, so as to constitute it a truism, that the Constitution must be interpreted in the light of the common law as it existed at the time of the adoption of the Constitution. *Den ex dem. Murray v. Hoboken Land and Improvement Company,* 18 Howard 272; *Lowe v. Kansas,* 163 U. S. 81. The liberty guaranteed by the Fourteenth Amendment's due process clause has been defined by this Court as the enjoyment of "those privileges long recognized *at common law* as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska,* 262 U.S. 390. The common law in 1787, the time of the adoption of the concept of due process in the Bill of Rights considered the illegitimate child as *nullius fillius,* or "nobody's child", not even the mother's, and entitled to no rights from any relation. Speiser, Recovery for Wrongful Death (the Lawyers' Co-operative Publishing Company, 1965) p. 587. Therefore due process rights at the time of the adoption of the due process concept in the Bill of Rights (which is equivalent to the due process concept of the Fourteenth Amendment) did not include any rights for illegitimate children stemming from filiation.

[2]Appellants' brief pp. 18-23

[3]Brief of NAACP Legal Defense and Education Fund, Inc. and the National Office for the Rights of the Indigent, pp 11, 13, 21-25.

that every illegitimate child should have all of the same rights, including inheritance rights, as children born in wedlock. Their basic argument herein is that the State cannot constitutionally make any difference in the rights of legitimates and illegitimates. Amicus[4] has even gone so far as to question the social usefulness of marriage and the legitimate family.

Undoubtedly appellants and amicus are unaware that this has been the classic approach of totalitarian regimes in their effort to destroy the family as the basic social institution.

Through the original Family Code of 1918, illegitimacy was eliminated by fiat in Bolshevik Russia. It was decreed that there should be no legal or social distinction between a child born in or out of wedlock. This decree was designed as part of the Bolshevik attack on the family. The Bolsheviks regarded the family as an enemy of the state because it claimed the loyalty of its members in preference to the state. Marriage was discouraged and free love advocated as an expression of contempt for the Western "petty bourgeois" restrictiveness on sex. As a result, the family in Bolshevik Russia became much less important in rearing the child, and the state became the institution which formed the minds of Soviet youth[5]. Kenkel, The Family in Perspective (Meredith

---

[4]Id. p. 13

[5]That such a practice is foreign to our system of government was recognized by this Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925): "The fundamental theory of liberty upon which all governments in this Union repose excludes any gen-

Publishing Co. 2d ed. 1966), pp. 118, 120; Nimkoff, Comparative Family Systems (Houghton Mifflin 1965) p. 55; Baber, Marriage and the Family (McGraw Hill 2d ed 1953) pp. 607-608, 638-639; Farber, Family Organization and Interaction (Chandler Publishing Co. 1964) pp. 245-246.

In Nazi Germany, illegitimacy was encouraged because the state was anxious for more births. Illegitimate mothers were considered of greater value to the nation than the childless married woman. Baber, Marriage and the Family (McGraw Hill 2d ed 1953) pp. 607-608.

Communist China's program in the early 1950's aimed at breaking up traditional family relationships backfired and led to increased juvenile delinquency, multiple sexual relationships and the complete instability of society. Farber, Family Organization and Interaction (Chandler Publishing Co. 1964) p. 245.

Louisiana's purposes in granting greater rights to legitimates than to illegitimates are not the punishment of illegitimates and not even the discrimination against immorality in sexual behavior. Louisiana's purposes in this area are positive ones; the *encouragement* of marriage as one of the most important institutions known to law, the preservation of the legitimate family as the preferred environment for socializing the

---

eral power of the State to standardize its children . . . The child is not the mere creature of the State; those who nuture him and direct his destiny have the right, coupled with the duty, to recognize and prepare him for additional obligations."

child, and the preservation of the security and certainty of property rights linked with family status.

Christian Roselius, in his lectures on the civil law of Louisiana, delivered at the Tulane Law School in 1871, described the civil law attitude toward marriage as follows:

> "Marriage is in every sense the most important institution known to the law. It is indeed the very cornerstone of the social fabric . . ."

See Franklin, The Institutes of Christian Roselius, 38 Tulane Law Review 279, 305 (1964).[6]

The State of Louisiana, consistent with civil law tradition, links property rights with family status based on marriage. This reflects the state's concern for the preservation and encouragement of marriage as the preferred social institution for civilizing its children.

The stable family socializes the child and invests him with the values required in Western civilization.[7] Marriage provides the preferred method of assuring the stable family. Marriage has been found to be an extremely useful social requirement for the preserva-

---

[6]This Honorable Court has very recently agreed with Roselius' assessment of the importance of marriage in *Loving v. Commonwealth of Virginia*, 87 S. Ct. 1817, 1824 (1967) as follows: "Marriage is one of the 'basic civil rights of man' *fundamental to our very existence and survival.*" (Emphasis ours)

[7] "A democratic society rests, for its continuance, upon the healthy, well rounded growth of young people into full maturity as citizens, with all that implies". *Prince v. Massachusetts*, 321 U.S. 158 (1944).

tion of the family and stabilizing the primary group in which children are reared. Baber, Marriage and the Family (McGraw Hill 2d ed 1953) pp. 680-683; Delliquadri, Helping the Family in Urban Society (Columbia University Press 1963) p. 177; Duvall, Family Development (Lippincott 2d ed 1962) pp. 48-49.

Marriage has been encouraged through the traditional distinction between legitimate and illegitimate relations which exists in the United States.

The marriage rate in the United States is higher than any other Western country and most other countries in the world. Nimkoff, Comparative Family Systems (Houghton Mifflin 1965) p. 331. The 1962 Statistical Abstract of the United States shows that increasingly more people are getting married than in the past and that the average bride and groom is younger today than in the past. Moreover, *the proportion of marriages to avoid illegitimacy of offspring is increasing*. See Boalt, Family and Marriage (Social Science Series, McKay & Co. 1965) pp. 65-66; Kenkel, The Family in Perspective (Meredith Publishing Co. 2d ed 1966) pp. 220-222; Farber, Family Organization and Interaction (Chandler Publishing Co. 1964) pp. 113-114, 129-130.

The eminent sociologist, H. T. Christensen, advances the theory that the more restrictive a culture is in sexual matters, the more infrequent will be the occurrence of premarital pregnancy, and that when

it does occur, the more certainly the restrictive culture will lead the couple to marriage in order to prevent the child from being illegitimate. Boalt, agreeing with Christensen's theory, points out that Utah, with a very restrictive sexual culture, has a low percentage of illegitimate children, but Denmark, with a very permissive sexual culture, has a high percentage of illegitimate children. Boalt, Family and Marriage (Social Science Series McKay & Co. 1965) pp. 83-84. Boalt further points out that while marriage is increasing, the reason for increased illegitimacy is not the failure of the marriage laws, but the fact that society now does more to help unmarried mothers. Boalt, op. cit. supra at p. 89. Moreover, Sirjamaki, in his study of The American Family (Cambridge University Press 1953) p. 150, points out that illegitimate daughters tend to err in the manner of their illegitimate mothers, producing more illegitimate children.

Dr. Goode's study of The Family (Foundations of Modern Sociology Series, Prentice Hall 1964) p. 30, points out that it is the *community* which maintains conformity to the norm of legitimacy, by giving or withholding prestige and honor. If the community grants almost as much respect for non-marriage as for marriage, illegitimacy increases.

Since marriage as an institution is fundamental to our existence as a free nation, it is the duty of the State of Louisiana to encourage it. One method of encouraging marriage is granting greater rights to legitimate offspring than those born of extra-marital

unions.[8] Superior rights of legitimate offspring are inducements or incentives to parties to contract marriage, which is preferred by Louisiana as the setting for producing offspring.

Tradition supports the power of Louisiana, rather than the federal government, to regulate the institution of marriage within the state's borders and to prescribe all the effects of marriage, including status of offspring and property rights derived from marriage.

Recognition of marriage as a civil contract in English Common law was transferred to the American colonies where it provided the legal structure of the American family. The acceptance of marriage as a contract carried with it the power of the colonial legislatures to determine the obligations and rights of marriage. The state was considered a third party to every marriage ceremony, representing the public interest by imposing its legal and ethical standards upon an otherwise private undertaking. After the adoption of the federal constitution, this pattern was continued with each state being given sole jurisdiction over marriage and family. Sirjamaki, The American Family (Cambridge University Press 1953) pp. 32-33;

---

[8]The recognition of the right to transmit property after death as an incentive for human behavior is recognized. "The founding fathers believed, and we continue to believe, that the ability to own property *and to transmit it to our families*, gives each of us an incentive to produce to the utmost of our abilities." (Emphasis supplied). Leach, Property Law, as quoted in Talks on American Law (Berman Ed. Vintage Books 1961) p. 165.

See In re Soeder's Estate, 220 N.E. 2d 547, 7 Ohio App. 2d 271 (1966); *Marquez v. Aviles*, 252 F. 2d 715, cert. den. 78 S. Ct. 917.

The historical or traditional jurisdiction of the States over marriage and family has a solid foundation in reason.

Deviation in sexual behavior is costly to society. Illegitimacy, a by-product of sexual deviation, constitutes one of society's dilemmas; the welfare of the illegitimate balanced against the desire of society to promote marriage as the preferable status for producing offspring. Louisiana has balanced her scales well.[9] Louisiana does not wish to endanger the stability of marriage and family by abolishing distinctions between legitimates and illegitimates. At the same time, Louisiana has eased the burden on illegitimates by her very liberal provisions for illegitimates. A fair balance has been struck between the needs of society and the welfare of the illegitimate, and the fourteenth Amendment requires no more of the State.

As Mr. Justice Holmes so aptly put it, "As to the violation of equal rights which is charged, it may be

[9]The wrongful death provision of Article 2315 of Louisiana's Civil Code cannot be considered in isolation, but must be considered as part of a total scheme for balancing the interests of society for stable marriages against the welfare of the illegitimate. Article 17 of Louisiana's Civil Code requires that laws in *pari materia* (same subject matter) must be construed with reference to each other. As pointed out in greater detail in Appellee Insurance Company's brief, pp. 21, 29-32, Louisiana has evolved an elaborate statutory scheme for encouraging and preserving legitimate familial relationships, while at the same time providing protection for illegitimates.

replied that the dogma of equality makes an equation between individuals only, *not between an individual and the community. No society has ever admitted that it could not sacrifice individual welfare to its own existence.* If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to their death. It runs highways and railroads through old family places in spite of the owner's protest, paying in this instance the market value, to be sure, because no civilized government sacrifices the citizen more than it can help, *but still sacrificing his will and his welfare to that of the rest.*" (Emphasis ours). Oliver Wendell Holmes, The Common Law, Lecture II, as quoted in Lerner, The Mind and Faith of Justice Holmes (Modern Library 1954) p. 58.

And again, in *Buck v. Bell*, 274 U.S. 200, Mr. Justice Holmes, elaborating on the theme of balancing the interest of the individual against that of the welfare of society, stated:

> "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence."

Regarding classification under the equal protection clause, Mr. Justice Holmes in *Dominion Hotel v. Arizona*, 249 U.S. 265, 268 (1919) stated the following:

> "The only question is whether we can say on our

> judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law . . . If in its theory, the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines."

Louisiana's Legislature has evidenced its belief in a policy of protecting marriage through the grant of preferred rights to legitimate relations. To paraphrase this Court's language in *Goesaert v. Cleary*, 335 U.S. 464 (1948), "This Court is certainly not in a position to gainsay such belief by the Louisiana Legislature."

III. CONCLUSION

In view of the foregoing, the appeal herein should be dismissed, or in the alternative, the judgment below affirmed.

Respectfully submitted,

HONORABLE JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

WILLIAM P. SCHULER,
Second Assistant Attorney General.

DOROTHY D. WOLBRETTE,
Assistant Attorney General.

L. K. CLEMENT, JR.,
Assistant Attorney General.

State of Louisiana
State Capitol Building
Baton Rouge, Louisiana

CERTIFICATE OF SERVICE

I, Dorothy D. Wolbrette, a member of the bar of the United States Supreme Court, hereby certify that a copy of the above and foregoing brief has been served on counsel for Appellant:

Adolph J. Levy
1407 Pere Marquette Bldg.
New Orleans, La. 70112

Jack Greenberg
10 Columbus Circle
New York, N. Y. 10019

Lawrence J. Smith
1407 Pere Marquette Bldg.
New Orleans, La. 70112

Leroy D. Clark
10 Columbus Circle
New York, N. Y. 10019

Norman Dorsen
40 Washington Square, South
New York, N. Y. 10003

William A. Porteous, Jr.
925 Hibernia Bank Bldg.
New Orleans, La. 70112

Melvin L. Wulf,
156 Fifth Ave.
New York, N. Y. 10010

William A. Porteous, III
925 Hibernia Bank Bldg.
New Orleans, La. 70112

Harry D. Krause
2009 Cureton Drive
Urbana, Illinois 61801

by placing same in the United States mail, properly addressed to them, with sufficient postage thereto annexed.

New Orleans, La., this ____ day of January, 1968.

Dorothy D. Wolbrette

B-1243, 1-68

Supreme Court of the United States

OCTOBER TERM, 1967

No. 508

THELMA LEVY, in her capacity as Administratrix of the succession of LOUISE LEVY and as tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY and AUSTIN LEVY,

versus

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D., and A. B. C. INSURANCE COMPANIES.

BRIEF ON BEHALF OF APPELLEE FOR REHEARING BEFORE THE SUPREME COURT OF THE UNITED STATES.

PORTEOUS AND JOHNSON,
WILLIAM A. PORTEOUS, JR.,
WILLIAM A. PORTEOUS, III,
925 Hibernia Bank Building,
New Orleans, Louisiana 70112,
Attorneys for Dr. Willard J. Wing and Interstate Fire and Casualty Co.,
HONORABLE JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
DOROTHY D. WOLBRETTE,
Assistant Attorney General,
L. K. CLEMENT, JR.,
Assistant Attorney General,
State Capitol,
Baton Rouge, Louisiana,
Attorneys for the State of Louisiana,
INGARD O. JOHANNESEN,
547 National Bank of Commerce Building,
New Orleans, Louisiana 70112,
Attorney for Board of Administrators, Charity Hospital of Louisiana.

INDEX.

TABLE OF AUTHORITIES.

Cases:

TABLE OF AUTHORITIES—(Continued):

TABLE OF AUTHORITIES—(Continued):

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 508.

THELMA LEVY, in her capacity as Administratrix of the succession of LOUISE LEVY and as tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY and AUSTIN LEVY,

versus

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D., and A. B. C. INSURANCE COMPANIES.

BRIEF ON BEHALF OF APPELLEE FOR REHEARING BEFORE THE SUPREME COURT OF THE UNITED STATES.

STATEMENT OF THE CASE.

ARGUMENT.

Appellant brought this action under Louisiana Civil Code Article 2315 alleging that she was tutrix of the minor children of decedent, Louise Levy, and hence entitled to recover for the wrongful death of Louise Levy. The children were concededly illegitimate. Appellees excepted to the petition and their exceptions were sustained. An appeal was taken by the appellant only as against Dr. Wing and Interstate Fire and Casualty Company. The Court of Appeal, Fourth